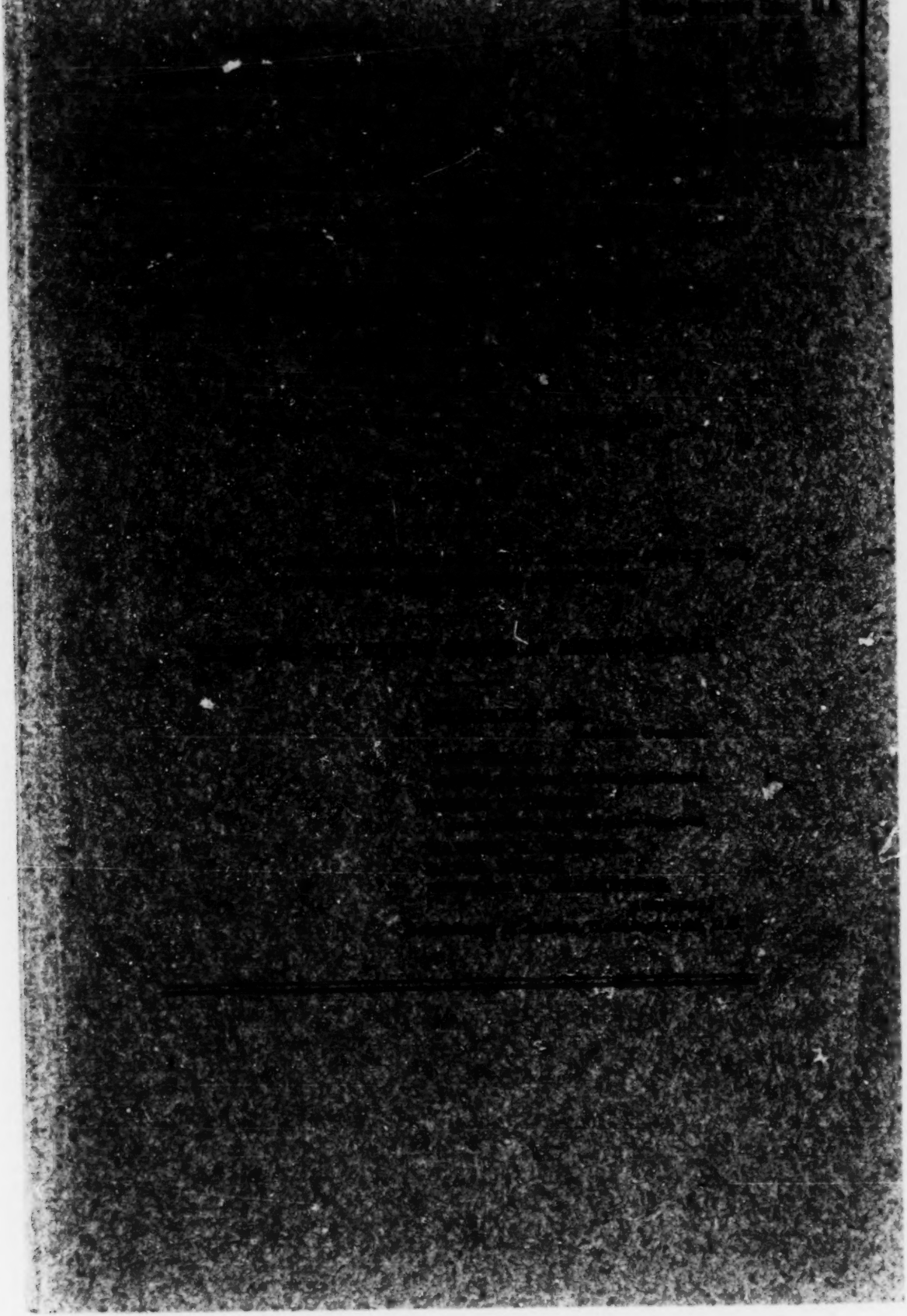

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 103

CHARLES W. BAKER, ET AL., APPELLANTS

v.

JOE C. CARR, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of Judge Miller of the District Court for the Middle District of Tennessee on convening a three-judge district court (R. 88) is reported at 175 F. Supp. 649. The opinion of the three-judge district court (R. 214) is reported at 179 F. Supp. 824.

JURISDICTION

The order of the three-judge district court dismissing the complaint was entered on February 4, 1960 (R. 220–221). Notice of appeal to this Court was filed on March 29, 1960 (R. 310). Probable jurisdiction was noted on November 21, 1960 (R. 314). The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether federal courts have jurisdiction to consider claims of denial of equal protection under the Fourteenth Amendment, with respect to the right to vote, resulting from malapportionment of state legislatures.

2. Whether, in the circumstances of this case, the district court should be permitted to exercise its equitable discretion to consider the merits of appellants' claims.

3. Whether rights under the Fourteenth Amendment are violated by gross and unreasonable malapportionment of state legislatures.

STATEMENT

This action was brought on May 18, 1959, in the District Court for the Middle District of Tennessee by certain of the appellants (hereinafter referred to as the "original plaintiffs"), citizens of and qualified voters in the State of Tennessee (R. 3), on their own behalf, on behalf of all qualified voters in their respective counties (R. 6), and on behalf of all Tennessee voters who were similarly situated (R. 6). The action was brought against appellees, the Tennessee Secretary of State, the Attorney General of Tennessee, the Tennessee Co-Ordinator of Elections, and the Members of the Tennessee State Board of Elections in their representative capacities (R. 4–5). The complaint asserted rights under 42 U.S.C. 1983[1] (R. 1–2), which provides for suits in equity or other proper proceedings to redress deprivations of federal

[1] This provision originated as Section 1 of the Ku Klux Klan Act of April 20, 1871, 17 Stat. 13.

constitutional rights under color of state authority, and claimed that the district court had jurisdiction under 28 U.S.C. 1343(3)[2] (R. 2).

The complaint alleged that the Constitution of Tennessee (Article II, Sections 4, 5, and 6) provides for a maximum of 99 members of the House of Representatives and 33 members of the Senate and directs the General Assembly [3] to allocate, at least every ten years, the Senators and Representatives among the several counties or districts "according to the number of qualified voters in each" (R. 7–8). The complaint further alleged that, despite these mandatory requirements, no reapportionment had been made by the legislature since the Act of 1901[4] (R. 10); that, although many demands had been made upon the legislature to reapportion in accordance with the command of the state constitution (R. 14), and although many bills had been introduced in the legislature to accomplish this purpose (R. 15; R. 32–38; see also Ex. 2 to Intervening Complaint, R.

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[2] That section grants federal district courts jurisdiction over civil actions commenced to redress any deprivations, under color of state authority, of federal constitutional or statutory rights. The plaintiffs also asserted rights under 42 U.S.C. 1988 (R. 1–2), which provides that state law may be applied by federal district courts in cases involving civil rights (including cases arising under 42 U.S.C. 1983) if federal law is inadequate to provide a remedy.

[3] The General Assembly is the official name of the legislature of the state of Tennessee. Tenn. Const., Art. II.

[4] Tenn. Code Ann., Sections 3–101 to 3–109. The complaint was later amended to include the allegation that the Act of 1901 was in violation of the state constitution when drawn because it was passed without the enumeration of voters required by the state constitution (R. 86–87).

126–160), the apportionment of seats in the legislature remained as fixed by the Act of 1901 (R. 9–10). Another allegation was that, during the period intervening between the Act of 1901 and the year 1950, the population of the State of Tennessee grew from 2,021,000 to 3,292,000, but the growth had been very uneven between counties (R. 10). As a result, it was alleged, the counties in which the original plaintiffs resided were entitled to additional representatives (R. 11–12; 21; Ex. B, R. 22), but were denied this right because the distribution of legislative seats was not in accordance with the number of voters in each of the counties and districts (R. 12; Ex. C, R. 24; Ex. D, R. 26). It was alleged that, under the existing apportionment, "a minority of approximately 37 percent of the voting population of the State now controls twenty of the thirty-three members of the senate" (R. 13; Ex. E, R. 28), and "a minority of 40 percent of the voting population of the State now controls sixty-three of the ninety-nine members of the House of Representatives" (R. 13; Ex. F., R. 30).

The complaint asserted that, when all the inequalities in Tennessee electoral districts were taken together, the result was to prevent the Tennessee General Assembly, as presently composed, "from being a body representative of the people of the State of Tennessee" (R. 13), and that a minority ruled in Tennessee by virtue of its control of both Houses of the General Assembly, contrary to the Tennessee Constitution, and "to the philosophy of government in the United States and all Anglo-Saxon jurisprudence in which the legislature has the power to make law only be-

cause it has the power and duty to represent the people"[5] (R. 13). As a result of the inequality of representation, it was alleged, there had been continuous and systematic discrimination by the legislature against the original plaintiffs and others similarly situated with respect to the allocation of the burdens and benefits of taxation (R. 16–18). The complaint concluded that the original plaintiffs, "and others similarly situated, suffer a debasement of their votes by virtue of the incorrect, arbitrary, obsolete and unconstitutional apportionment," in violation of their right to the equal protection of the laws required by the Tennessee Constitution,[6] and that, "[b]y a purposeful and systematic plan to discriminate against a geographical class of persons * * *", they were denied the due process and equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States (R. 12, 19).

The complaint requested that a district court of three judges be convened pursuant to 28 U.S.C. 2281, and that the three-judge court (1) declare unconstitutional, as violative of the equal protection and due process clauses of the Fourteenth Amendment, "the present legislative apportionment of the State of Tennessee"; (2) declare the reapportionment Act of 1901 and the implementing provisions of the Tennessee Code violative of the state constitution and the Fourteenth Amendment; (3) restrain the appellees from

[5] Tenn. Const., Art. I, Section 1, states that "all power is inherent in the people."

[6] Tenn. Const., Art. I, Section 5; Art. II, Sections 4–6; Art. XI, Sections 8, 16.

holding elections for members of the Tennessee legislature under the districts as established by the 1901 Act until such time as the legislature reapportioned the districts in accordance with the Tennessee Constitution; and (4) direct the appellees to hold the next elections for members of the Tennessee legislature on an at-large basis, with the thirty-three candidates for the State Senate receiving the highest number of votes declared elected to the State Senate, and the ninety-nine candidates for the House of Representatives receiving the highest number of votes elected to the House (R. 19–20).

On June 8 and 12, 1959, the appellees filed motions to dismiss the complaint for lack of jurisdiction over the subject matter, failure to state a claim upon which relief could be granted, and failure to join indispensable parties (R. 46–47). On June 17, 1959, appellees filed a motion to dismiss the action without assembling a three-judge court, upon the ground that no substantial federal question was raised (R. 48). This motion was denied on July 31, 1959, by Judge Miller of the district court (R. 94). Judge Miller's opinion stated that he was "not prepared to say that the federal question invoked is so obviously without merit that the complaint should not even be referred to a three-judge court for consideration" (R. 90), or that the decision in *Colegrove* v. *Green*, 328 U.S. 549, necessarily "close[d] the door to relief in the present case" [7]

[7] In *Colegrove*, the Court sustained the dismissal of an action by qualified voters to restrain the holding of congressional elections in Illinois under the provisions of an Illinois law determining congressional districts. Judge Miller referred to the fact that, in *Colegrove*, the Illinois legislature, in failing to

(R. 90). Judge Miller said further that there were "differences between [*Colegrove*] and the present [case] that may ultimately prove to be significant" (R. 91), and observed that "[t]he situation is such that if there is no judicial remedy there would appear to be no * * * remedy at all" (R. 91). Although in cases involving legislative reapportionment "[i]t can certainly be said that generally there has been no unanimity of opinion among the justices of the Supreme Court either as to the result to be reached or as to the grounds for refusing intervention," Judge Miller stated that "a court of equity should at least be willing from time to time to re-evaluate the problem and to re-explore the possibilities of devising an appropriate and effective remedy—a remedy which would safeguard the integrity of the state government and at the same time protect and enforce the rights of the individual citizen" (R. 93–94). Accordingly, pursuant to 28 U.S.C. 2284, he sent notice of the pendency of the action to the Chief Judge of the Court of Appeals of the Sixth Circuit (R. 94), and on August 10, 1959, a three-judge court was convened (R. 94–95).

On February 4, 1960, after other appellants, including Mayor Ben West of the City of Nashville, Tennessee,[5] and the City of Chattanooga, Tennessee, had been allowed to intervene as plaintiffs (R. 97, 99), and had filed complaints in intervention (R. 98,

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redistrict, had not violated any specific provision of its own constitution, and that there was ample power in Congress to redistrict the state if existing districts had become inequitable.

[5] West's intervening complaint asserted that the district court had jurisdiction under 28 U.S.C. 1343(4) as well as 28 U.S.C. 1343(3) (R. 103).

100), the three-judge court entered an order dismissing the complaint on the grounds that the court lacked jurisdiction of the subject matter and the complaint failed to state a claim upon which relief could be granted (R. 220). Prior to entering this order, the court rendered an opinion asserting that "the federal rule, as enunciated and applied by the Supreme Court, is that the federal courts, whether from a lack of jurisdiction or from the inappropriateness of the subject matter for judicial consideration, will not intervene in cases of this type to compel legislative reapportionment" (R. 216). For this reason, the court declared that it had "no right to intervene or to grant the relief prayed for" (R. 220).

SUMMARY OF ARGUMENT

I

Appellants claim that their rights under the Fourteenth Amendment are denied by arbitrary and unreasonable malapportionment of the state legislature, which gravely diminishes the value of their right to vote. The three-judge court below dismissed this action on the ground that the case involves a political question and that therefore it was without jurisdiction, citing *Colegrove* v. *Green*, 328 U.S. 549. This ruling was erroneous.

A. General jurisdiction is conferred by 28 U.S.C. 1343, which gives the district court jurisdiction of any civil action to secure redress for a violation of constitutional rights under color of state authority. *Monroe* v. *Pape*, No. 39, this Term, decided February 27, 1961.

B. Appellants have "standing" to bring this action, for they seek to vindicate personal rights. This

Court has recognized that voters have standing to assert either that they have been denied the right to vote entirely or that they must vote pursuant to an invalid state apportionment of congressional Representatives.

C. The constitutional issue is not a "political question" beyond the power of the federal courts to decide. The Court has held, generally, that issues are not rendered non-justiciable merely because elections are involved when plaintiffs are seeking to vindicate private rights (*Nixon* v. *Herndon*, 273 U.S. 536, 540), and in our view malapportionment problems do not form an exception.

1. The Court has never held that apportionment cases necessarily raise non-justiciable questions. Rather, it has passed on the merits of apportionment systems. *E.g.*, *Smiley* v. *Holm*, 285 U.S. 355. *Colegrove* v. *Green*, *supra*, does not hold to the contrary. Admittedly, three Justices would have held there that apportionment of Representatives is a political question beyond the power of federal courts to decide, but a majority of the participating Justices (Mr. Justice Rutledge concurring, and the three dissenting Justices) took the view that the federal courts do have such power. Mr. Justice Rutledge, whose vote in this respect was dispositive of the case, concluded that this power should be employed "only in the most compelling" circumstances, which he found were absent.

In no subsequent apportionment case does this Court appear to have held that the federal courts lack power to adjudicate the constitutionality of ap-

portionment systems. In *South* v. *Peters,* 339 U.S. 276, the Court stated that the "[f]ederal courts consistently refuse to exercise their equity powers * * *"—not that no power exists. In a series of later cases, the Court has refused to entertain the issue of malapportionment on the merits without indicating whether the reason was lack of power or simply the exercise of equity discretion. It cannot, however, be assumed that the Court intended to settle this important issue, in these *per curiam* decisions, by reliance (not clearly stated) on the position of a minority of the Court in *Colegrove,* without the benefit of full briefing or oral argument.

2. Even if the plurality opinion in *Colegrove* v. *Green* had been accepted by a majority of the Court, the position stated in that opinion has subsequently been undermined by later developments.

a. One of the basic themes of the opinion is that the drawing of district lines for congressional elections is necessarily a political and not a judicial question. But, subsequently, as we have seen, this Court in *South* v. *Peters,* formulated its dismissal of a similar suit in terms of equity discretion. Just this term, in *Gomillion* v. *Lightfoot,* 364 U.S. 339, the Court held that the power of a state to fix boundaries of its political subdivisions cannot be exercised in such a way as to deprive a person of his right to vote because of race. While the *Gomillion* opinion distinguishes the *Colegrove* decision on the ground that legislative inaction, not affirmative action, was involved in the latter case, this distinction can only

relate to the merits of the constitutional violation or to the appropriate remedy. There is no basis for considering a constitutional violation which results from legislative inaction, where the legislature has a constitutional duty to act, as beyond the jurisdiction of the federal courts while a constitutional violation which results from legislative action is within their jurisdiction. And recently, in the Civil Rights Acts of 1957 and 1960, Congress made clear a national policy that, whatever disagreement may exist as to other civil rights, the right to vote should be afforded federal protection to the fullest possible extent, and that that protection should principally take the form of court action.

b. Another important factor on which reliance was placed in the plurality opinion in the *Colegrove* case is the difficulty of finding an effective and appropriate remedy. But recent cases show that state legislatures may well decide to heed their duty under state law when faced with the likelihood of judicial action (*Asbury Park Press, Inc.* v. *Woolley*, 33 N.J. 1, 161 A. 2d 705), or with merely a judicial admonition and possible action (*Magraw* v. *Donovan*, 159 F. Supp. 901 (D. Minn.)). Governing bodies do not lightly reject a declaration by a constitutional organ of government that a challenged course of action is unlawful. Thus, no additional judicial remedy may ever be needed. Moreover, the court's declaratory judgment of invalidity could be accompanied by an injunction against the election officials forbidding them to hold an election under the constitutionally offensive apportionment.

If the state legislature continues to refuse to act, other remedies are available to the court. First, it could order an election at large. While the Tennessee Supreme Court has said that Tennessee does not provide for such a remedy (*Kidd* v. *McCanless,* 200 Tenn. 273, 277, 292 S.W. 2d 40, 42, appeal dismissed, 352 U.S. 920), a federal court, in preventing the defeat of a federal constitutional right, is not restricted to the remedies provided by state law. See *Holmberg* v. *Armbrecht,* 327 U.S. 392, 395. Second, the court could order an election conducted on the basis of a new enumeration and apportionment. In the case of Tennessee, an enumeration of qualified voters by the court, or by county election officials on order of the court, would be largely a ministerial act since the federal census provides a count of voting population. The apportionment requires the exercise of only a minimal amount of discretion for the Tennessee constitution provides a mathematical formula. No remapping of districts is required; the court would merely have to decide which adjoining counties would be grouped together. Moreover, if the court below wished to avoid the actual apportionment of representatives, it could require the state election officials to prepare an apportionment on the basis of the new enumeration and submit it to the court for approval.

As in other cases of an alleged constitutional violation, this case should be approached by ascertaining whether the federal courts have jurisdiction over the issue presented. If they have jurisdiction and a constitutional violation is found, then is the time for the question of remedy to be considered. We cannot

accept the assumption that the federal courts possess no appropriate remedy, among their broad and flexible equitable powers, to prevent a violation of the Fourteenth Amendment arising from state legislative malapportionment. In other Fourteenth Amendment cases, the powers of the federal courts have not been found lacking.

3. In any event, the plurality opinion in *Colegrove* v. *Green,* concerning state malapportionment of Representatives, should not be applied to the significantly different problem of state legislative malapportionment. That opinion stated that Article I, Section 4, of the Constitution gives exclusive authority to Congress to secure fair congressional apportionment. But neither that section nor any other part of the Constitution gives Congress such exclusive power with regard to representation in state legislatures.

In addition, the *Colegrove* opinion stressed the existence of other remedies in Congress or the state legislatures. While Congress has repeatedly failed to act, the state legislatures—spurred by decennial reapportionment by Congress among the states—have generally from time to time reapportioned their congressional districts. But numerous states have done nothing with regard to apportionment of state legislatures for twenty-five or fifty years. The problem has been almost impossible to correct in Tennessee and many other states because of malapportionment in the state legislatures themselves and the absence of any other remedy. The only realistic remedy is federal judicial action.

II

Whether or not a constitutional violation is ultimately found, this case presents "compelling circumstances" (*Colegrove* v. *Green,* 328 U.S. at 565 (Mr. Justice Rutledge concurring)) for the federal courts to exercise their equitable discretion and consider the alleged violation of the Fourteenth Amendment on the merits.

A. The legislatures are even more inequitably apportioned in many states than congressional districts. In Illinois at the time of *Colegrove* the disparity in population between the largest and the smallest congressional districts in any state was eight to one, but as of the 1950 census the greatest disparity in congressional districts was three to one (South Dakota). In contrast, the disparity in state legislative districts is, for example, 676 to 1 in Vermont, 136 to 1 in New Hampshire, 75 to 1 in Florida, and 19 to 1 in Tennessee.

B. Malapportionment of state legislatures is subverting responsible state government by causing public loss of confidence and has resulted in the failure of the states to meet pressing local needs. This has been particularly true with regard to the increasing problems of urban areas, since malapportionment in Tennessee and elsewhere results, in general, in discrimination against urban residents. In fact, the legislatures have frequently not only been indifferent to urban needs, but have affirmatively made it more difficult for the urban areas to meet their own problems by placing, as in Tennessee, discriminatorily

heavy taxation on them, giving them a disproportionately small share of state benefits, and even denying them a fair share of matching federal grants.

C. Federal judicial action is the only realistic remedy for Tennessee's legislative malapportionment.

The only other possible state remedy is by action of the state legislature since the Tennessee Supreme Court has already denied judicial relief and the state constitution does not provide for initiative and referendum by the people. The Tennessee legislature does not offer a realistic remedy, however, since, as the complaint alleges, bills for reapportionment have been repeatedly rejected by the overrepresented rural majority ever since the last apportionment in 1901. The very grossness of the current discrimination militates against its being corrected by legislative means.

While Congress has the power to act under the Fourteenth Amendment, this remedy is also unrealistic. Congress has refused to enact even a bill relating to its own apportionment. Congressional malapportionment is closely related to reapportionment of state legislatures, for a legislature with full urban representation is unlikely to countenance malapportionment of congressional districts discriminating against urban voters.

III

The district court's decision below seems not to determine the question on the merits, *i.e.*, whether the complaint sufficiently alleges a violation of the Fourteenth Amendment. We therefore think that this issue should be left to the court below for initial

determination after this Court holds that that court has jurisdiction and can properly exercise its equitable discretion to consider the merits. For present purposes it is enough to emphasize that at some point malapportionment of state legislatures becomes so gross and discriminatory that it violates the Fourteenth Amendment.

A. The equal protection clause of the Fourteenth Amendment is violated, not only when a state discriminates with regard to race, but whenever it makes an arbitrary and unreasonable classification. If this is so with regard to legislation affecting economic and social interests, it is particularly so as to the right to vote, which is at the heart of democratic political processes. This Court has recognized that a voter has a constitutional right to have his vote counted without its being diluted by fraud. *E.g., United States* v. *Classic,* 313 U.S. 299; *United States,* v. *Saylor,* 322 U.S. 385. The dilution of one's vote by gross malapportionment is just as unconstitutional. The fact that malapportionment results from state "inaction" is not decisive since the state has a constitutional duty to act in order to prevent the denial of this basic constitutional right—the right of large numbers of voters to participate fairly and equally in their own government. Moreover, a deliberate failure to correct an earlier apportionment—coupled with the state's conduct of elections on the basis of this apportionment—is a form of state action.

B. In addition, gross discrimination violates the due process clause of the Fourteenth Amendment. See *Bolling* v. *Sharpe,* 347 U.S. 497. Gross malapportionment of state legislatures which seriously re-

stricts the right of voters to participate fairly in choosing the state government clearly violates "the very essence of a scheme of ordered liberty" and a fundamental principle of liberty and justice which lies "at the base of all our civil and political institutions." *Palko* v. *Connecticut,* 302 U.S. 319, 325, 328.

C. Appropriate standards are available to determine whether a particular legislative apportionment is so arbitrary and unreasonable as to violate the Fourteenth Amendment. These include the extent of the disparity between districts within the state; and whether the state affords the people a political remedy, such as initiative and referendum, not requiring the approval of the legislature. If such tests as these are satisfied by those challenging a system of apportionment, the burden of providing a rational explanation should shift to the state.

ARGUMENT

This case involves one of the most basic rights in any democracy, the right to fair representation in one's own government. According to the complaint—and at this stage of the case the allegations of the complaint must be accepted as true—the Tennessee legislature has not been reapportioned since 1901, contrary to the explicit terms of the state constitution which requires reapportionment every ten years. The result is that a single vote in one particular county is worth nineteen votes in another county in electing members of the state legislature; and thirty-seven percent of the voting population elects sixty percent of the State Senate—twenty of thirty-three members—and forty percent of the voters elects sixty-three percent of the House of

Representatives—sixty-three of ninety-nine members. This discrimination has, as in several other states, gravely diminished the value of the franchise of many voters.

This widespread discrimination, principally against urban voters, has at least two consequences. First, these voters are deprived of the right to share fairly in choosing their own government. In numerous cases, this Court has recognized that deprivations of the right to vote, such as those on account of race or color, being unconstitutional, are properly the concern of the federal courts. *E.g., Gomillion* v. *Lightfoot,* 364 U.S. 339. In Tennessee all urban voters can vote, but their votes count for much less than the votes of their fellow citizens who happen to live in rural areas. The discrimination in this case is just as real as if urban voters had been given only half a vote apiece.

Second, the complaint alleges more than an abstract right to have an equal choice in one's own government—crucial as that right is in a democracy. The complaint states that the extreme underrepresentation of urban voters has resulted in discrimination by the state legislature against urban areas in the state's exercise of its governmental powers. More specifically, the complaint alleges that the state legislature has systematically imposed a discriminatorily larger proportion of state taxes on underrepresented areas but given them back in the form of benefits a smaller proportion of state funds and federal grants given the states on a matching basis. In Tennessee, as in many other states, the underrepresentation of urban voters has been a dominant factor in the refusal of state

legislatures to meet the growing problems of our urban areas.

The three-judge court, however, while admitting that the wrong was serious, held that it had no power to consider the case, and cited *Colegrove* v. *Green,* 328 U.S. 549. As we will show, the plurality opinion in *Colegrove* does not appear to have been adopted by a majority of the Court (pp. 24–29); several of the principles on which it was based are no longer valid (pp. 29–41); and, in any event, that case, which involved congressional districts, should not be applied to state legislative districts (pp. 41–44). In short, we believe the federal courts have jurisdiction to consider whether Tennessee's discrimination against appellants in electing the state legislature violates the federal Constitution.

I

THE THREE-JUDGE COURT HAD JURISDICTION OVER THIS ACTION

A. GENERAL JURISDICTION IS CONFERRED BY FEDERAL STATUTE

Congress has provided in 42 U.S.C. 1983 for suits in equity in federal district courts to redress deprivations of federal constitutional rights under color of state authority. This Court has held that that provision protects the rights guaranteed by the Fourteenth Amendment. *Monroe* v. *Pape,* No. 39, this Term, decided February 20, 1961; *Hague* v. *C.I.O.,* 307 U.S. 496, 526. The case before the Court is a "suit in equity" under 42 U.S.C. 1983 to redress the deprivation by state officials of rights, relating to the elective franchise, which are secured by the

due process and equal protection clauses of the Fourteenth Amendment.[9] Jurisdiction over such an action is conferred on the federal district courts by 28 U.S.C. 1343, which provides that "[t]he district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: "* * * (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States * * *," and "(4) * * * to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." [10]

B. APPELLANTS HAVE "STANDING" TO BRING THIS ACTION, IN THE SENSE OF HAVING SUFFICIENT PERSONAL INTEREST IN THE RELIEF SOUGHT

The appellants, citizens of and qualified voters in the State of Tennessee (R. 3), instituted this suit in their own behalf and in behalf of other qualified voters who reside in appellants' respective counti s or who are similarly situated (R. 6), to vindicate personal and individual rights under the equal protection and due process clauses of the Fourteenth Amendment. The complaint states that appellants have been deprived of their rights under the Fourteenth Amendment to non-discriminatory representa-

[9] Appellants' substantive contentions under the Fourteenth Amendment are discussed below (pp. 58–72).

[10] Subsection (4) was added by the Civil Rights Act of 1957, 71 Stat. 637.

tion in the Tennessee General Assembly (R. 6, 10, 19).

The violation of the Fourteenth Amendment asserted by the appellants is a private wrong directly affecting themselves and large numbers of other Tennessee voters. In *Ex parte Yarbrough*, 110 U.S. 651, this Court held that once the state has defined the class of persons entitled to vote (in that case, for a member of Congress) the right of any member of the class to vote is protected by the Constitution. That right is enforceable in the courts. *Nixon* v. *Herndon*, 273 U.S. 536; cf. *Wiley* v. *Sinkler*, 179 U.S. 58. If the denial of the right to cast a ballot is of a sufficiently "private" character to give the victim standing to sue for relief, a denial of the right to cast an effective ballot cannot logically be treated as a "public" wrong so as to deprive the victim of standing.

The standing of private persons to bring an action in federal courts in circumstances similar to the present case was recognized in *Smiley* v. *Holm*, 285 U.S. 355. There, a unanimous Court reviewed the merits of, and granted relief in, a suit by a Minnesota "citizen, elector and taxpayer" (*id.* at 361) to enjoin the holding of a congressional election pursuant to a state redistricting statute which violated the federal requirement that redistricting be carried out by the state's lawmaking power including the approval of the governor. Similarly, in *Koenig* v. *Flynn*, 285 U.S. 375, the Court reviewed on the merits a suit brought by "citizens and voters" (*id.* at 379) of New York for a writ of mandamus to the state Secretary of State to certify that

Representatives are to be elected according to districts defined in a resolution of the state legislature. And in *Leser* v. *Garnett*, 258 U.S. 130, this Court took jurisdiction and decided the merits of an action brought by Maryland voters to have the names of women stricken from the list of qualified voters on the ground that the state constitution restricted suffrage to men and that the Nineteenth Amendment to the federal Constitution had not been validly ratified. See also *Hawke* v. *Smith* (*No. 1*), 253 U.S. 221; *Stiglitz* v. *Schardien*, 239 Ky. 799, 40 S.W. 2d 315.

In *Colegrove* v. *Green*, 328 U.S. 549, three members of the Court concluded that the wrong resulting from improper congressional apportionment was suffered by the state "as a polity" rather than by individual voters. *Id.* at 552. But this conclusion was based on the characterization of the action as an attempt to "reconstruct the electoral process" of the state "in order that it [might] be adequately represented in the councils of the Nation." *Ibid.* On the other hand, these Justices suggested that individual voters have standing to redress "a private wrong," namely, their "discriminatory exclusion * * * from rights enjoyed by other citizens." *Ibid.* Here, appellants are in no way seeking to vindicate Tennessee's rights vis-à-vis the Nation. Instead, their sole request is that they themselves receive adequate representation in the councils of the state by prohibiting their "discriminatory exclusion * * * from rights enjoyed by other citizens."

C. THE CONSTITUTIONAL ISSUE IS NOT A "POLITICAL QUESTION" BEYOND THE POWER OF THE FEDERAL COURTS TO DECIDE

Appellants assert a gross violation of important rights protected by the Fourteenth Amendment. The constitutional and legal questions arising out of the protection of such Fourteenth Amendment rights are not "political," in the sense of being non-justiciable, merely because elections are involved. Mr. Justice Holmes, speaking for the Court in *Nixon* v. *Herndon, supra,* 273 U.S. at 540, characterized an argument which sought to equate claims pertaining to electoral matters with "political questions" as "little more than a play upon words. Of course, the petition concerns political action but it alleges and seeks to recover for private damage. That private damage may be caused by such political action and may be recovered for in a suit at law hardly has been doubted for over two hundred years * * *." The proponent of a similar argument in *McPherson* v. *Blacker,* 146 U.S. 1, 23, was reminded by the Court that "the judicial power of the United States extends to all cases in law or equity arising under the Constitution and laws of the United States * * *." In short, given a sufficient showing of discrimination, "the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights." *Snowden* v. *Hughes,* 321 U.S. 1, 11. See also *Gomillion* v. *Lightfoot,* 364 U.S. 339, 347. These general principles are applicable to the present case.

1. *This Court Has Never Held That Questions of Apportionment Are Beyond the Power of the Federal Courts.*

It should be stressed that this Court has never held that apportionment cases necessarily raise non-justiciable questions. On the contrary, it has passed on the merits of apportionment systems in several cases and has granted relief in some of them. Thus, in *Smiley* v. *Holm,* 285 U.S. 355, the Court held that the existing Minnesota apportionment of United States Representatives did not meet federal requirements because the governor had refused to approve the bill, and accordingly the Court ordered an election-at-large. The Court also held a state apportionment law invalid (the governor had vetoed it) and ordered an election-at-large in *Carroll* v. *Becker,* 285 U.S. 380. And in *Koenig* v. *Flynn,* 285 U.S. 375, the Court affirmed a decision of a state court holding that, in the absence of a valid districting statute (the governor had not approved the resolution of the state legislature) to conform to the increase in Representatives allotted to a state by Congress, the additional Representatives must be elected at large.

Colegrove v. *Green,* 328 U.S. 549, does not hold to the contrary. Admittedly, Mr. Justice Frankfurter, joined by two other Justices, would have held that state apportionment of Representatives is a political question beyond the power of the federal courts to decide. But a majority of the participating Justices (Mr. Justice Rutledge concurring, and the three dissenting Justices) took the view that federal courts had the power to adjudicate the validity of the system

of apportionment under attack. Mr. Justice Rutledge, whose vote in this respect was dispositive of the case, concluded that this power should be employed "only in the most compelling circumstances" (*id.* at 565). Since such circumstances were absent, he decided that "the case is one in which the Court may properly, and should, decline to exercise its jurisdiction" [11] (*id.* at 566).

Shortly after the *Colegrove* case, the scope of the Court's decision became even more clear. In *Cook* v. *Fortson*, 329 U.S. 675, 678, involving the Georgia county unit system, Mr. Justice Rutledge described the actual ruling in the earlier case:

> * * * A majority of the justices participating refused to find that there was a want of jurisdiction, but at the same time a majority, differently composed, concluded that the relief sought should be denied. I was of the opinion that, in the particular circumstances, this should be done as a matter of discretion, for the reasons stated in a concurring opinion.[12]

In *Cook* v. *Fortson* Mr. Justice Rutledge would have postponed consideration of the issue of jurisdiction to the argument, even though he admitted that the order on appeal might "have become moot in part." *Id.* at 677. The Court, however, dismissed the bills, citing *United States* v. *Anchor Coal Co.*, 279 U.S.

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[11] At this point, Mr. Justice Rutledge quoted in a footnote from *American Federation of Labor* v. *Watson*, 327 U.S. 582, 593: "The power of a court of equity to act is a discretionary one * * *."

[12] For a discussion of the equitable discretion aspect of the *Colegrove* decision, see *infra*, pp. 44–58.

812, which involved the dismissal of a bill seeking an injunction as moot.

In *MacDougall* v. *Green*, 335 U.S. 281, the Court passed on the merits of the claim that an Illinois statute requiring a candidate of a new political party to obtain a specified number of signatures on his nominating petitions in fifty of the 102 counties in the state was unconstitutional. Mr. Justice Rutledge, in a separate opinion, stated that "this case is closely analogous to *Colegrove* v. *Green*" and "[e]very reason existing in *Colegrove* * * * which seemed to me compelling to require this Court to decline to exercise its equity jurisdiction and to decide the constitutional questions is present here. * * * As in *Colegrove* * * * I think the case is one in which * * * this Court may properly, and should, decline to exercise its jurisdiction in equity." *Id.* at 284, 286–287. No member of the Court suggested that the Court was without jurisdiction or power to consider the issue.

In *South* v. *Peters*, 339 U.S. 276, 277, the Court again recognized that the question is not one of judicial power but of its proper exercise. The decision was embodied in a single sentence: "Federal courts consistently *refuse to exercise* their equity powers in cases posing political issues arising from a state's geographical distribution of electoral strength among its political subdivisions" (emphasis added). None of the cases cited in support of this conclusion held that the issue involved was not justiciable. Reliance was placed on *MacDougall* v. *Green*, in which, as we have seen, the Court passed on the merits of a state

election issue; *Colegrove* v. *Green*, in which a majority of the Court held that the federal courts have power to consider the merits of apportionment cases; and *Wood* v. *Broom*, 287 U.S. 1, 8. In the *Wood* case, the Court held that the Reapportionment Act of 1911, requiring that congressional election districts be of contiguous and compact territory and, as nearly as practicable, of equal population, applied only to districts formed under that Act and not to the Apportionment Act of 1929. Four members of the Court (in a statement beginning on page 8) said that they believed that the bill should be dismissed "for want of equity." That phrase suggests that under traditional equity principles an injunction should not issue, not that the courts are without jurisdiction to consider the merits because a non-justiciable political issue is involved.[13]

In no subsequent apportionment case has this Court held, so far as we can determine, that the federal courts lack power to adjudicate the constitutionality of apportionment systems. In *Cox* v. *Peters*, 342 U.S. 936, involving an attack on Georgia's county unit laws, and *Remmey* v. *Smith*,

[13] The Court in *South* v. *Peters* also cited as authority "cf. *Johnson* v. *Stevenson*, 170 F. 2d 108 (C.A. 5th Cir., 1948)." In that case, the court of appeals held that 8 U.S.C. (1946 ed.) 43, which is the same statute as is involved here, did not provide a remedy, as a matter of substance, for fraudulent returns in a Senate primary election: "We have here no question of votes excluded contrary to the Constitution, but only of frauds and illegalities under the Texas law" (*id.* at 111). And, significantly, the court emphasized that the plaintiff did "not have the standing of a voter who is being discriminated against contrary to the Constitution and whose right is clearly secured by it" (*ibid.*).

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342 U.S. 916, involving a suit to compel reapportionment of the Pennsylvania legislature, the appeals were simply dismissed for want of a substantial federal question, without citation of authority. In *Anderson* v. *Jordan,* 343 U.S. 912, the Court dismissed the appeal on the authority of *Colegrove* v. *Green, MacDougall* v. *Green,* and *Wood* v. *Broom* (the opinion of the Court). As we have seen, in the latter two cases the Court considered the issues on the merits. In *Kidd* v. *McCanless,* 352 U.S. 920, involving an attack upon the same Tennessee apportionment law now before the Court, the appeal was dismissed on the authority of *Colegrove* v. *Green* and *Anderson* v. *Jordan.* In *Radford* v. *Gary,* 352 U.S. 991, involving an attack on the Oklahoma apportionment laws, this Court affirmed the district court's dismissal of the action, citing *Colegrove* v. *Green* and *Kidd* v. *McCanless.* And in *Hartsfield* v. *Sloan,* 357 U.S. 916, without citation of authority, the Court denied a motion for leave to file a petition for a writ of mandamus to compel the convening of a three-judge court to pass on the validity of the Georgia county unit laws.

Where the Court has rejected attacks on apportionment systems without citation, it is of course impossible to know the basis of the decision. But such action is just as compatible with a determination that the case clearly does not present "compelling circumstances" necessary for federal judicial relief as with a holding of lack of power. Where the Court has cited *Colegrove* v. *Green,* the reason for this reliance is also not entirely clear. As we

have seen, four of the seven Justices voting in that case upheld the power of the Court to consider the merits. The citation of the *Colegrove* decision to support rejection of attacks on state apportionment must therefore, we believe, mean reliance on the only holding of the prevailing majority in that case, *i.e.*, that an injunction was not justified in the circumstances. It cannot be assumed that the Court intended to settle this important issue of federal judicial power in accordance with the view of the minority of the Court in *Colegrove* v. *Green* by citing *Colegrove* in *per curiam* decisions, without the benefit of full briefing or oral argument.

2. *Even if the Plurality Opinion in* Colegrove *v.* Green *Had Been Accepted by a Majority of the Court, Its Position Has Been Undermined by Subsequent Developments.*

As we have seen, a majority of the Court has never explicitly accepted the position of the plurality opinion in *Colegrove* v. *Green,* and we do not believe that it can be treated as an opinion of the Court. But even if that position had been upheld by the Court as a whole, subsequent events have undermined its validity. We believe therefore that, if it is the law of this Court, and is binding on this case (but see *infra,* pp. 41–44), it should be reconsidered and overruled.

In the plurality opinion, it was said that: (1) *Wood* v. *Broom, supra,* 287 U.S. 1, held that there was no federal statutory requirement of equality of population in congressional districts (*id.* at 551); (2) the issues were of a "peculiarly political nature and therefore not meet for judicial determination" (*id.* at 552);

(3) the basis of the suit was "not a private wrong, but a wrong suffered by Illinois as a polity," *i.e.*, that the appellants had no standing to sue[14] (*ibid.*); (4) the Court could not affirmatively re-map congressional districts (*id.* at 553); (5) an election-at-large would be politically undesirable and might not be acquiesced in by the House of Representatives in the exercise of its power to judge the qualifications of its members (*ibid.*); (6) "[i]t is hostile to a democratic system to involve the judiciary in the politics of the people" (*id.* at 553–554); (7) Article I, Section 4, of the Constitution "conferred upon Congress exclusive authority to secure fair representation by the States in the popular House" (*id.* at 554); (8) and the remedy lay either in invoking the power of Congress or in securing "State legislatures that will apportion properly" (*id.* at 556). The relative importance which the three Justices joining in this opinion attached to each of these factors is not clear.[15] Nevertheless, it seems to us that most of these factors, even if controlling at the time the *Colegrove* case was decided, are of substantially less importance today.

a. One of the basic themes of the opinion is that the drawing of district lines for congressional elections is necessarily a political and not a judicial ques-

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[14] We have seen (p. 22) that this statement regarding standing does not apply here.

[15] Accordingly, explanations of the opinion have been various and contradictory. Compare, *e.g.*, Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L. Rev. 1057 (1958); Note, *Injunctive Protection of Political Rights in the Federal Courts*, 62 Harv. L. Rev. 659, 662 (1949); Note, *Constitutional Right to Congressional Districts of Equal Population*, 56 Yale L. J. 127 (1946). See also Hart and Wechsler, *The Federal Courts and the Federal System* (1953), p. 207.

tion. But at least two subsequent decisions of this Court have cast doubt on this proposition. In *South* v. *Peters*, this Court phrased its dismissal of a similar suit in terms of the discretion of equity courts (see *supra*, pp. 26–27). Just this Term, in *Gomillion* v. *Lightfoot*, 364 U.S. 339, 346, the Court held that the power of a state to fix the boundaries of its municipalities may not be exercised in such a way as to deprive a citizen of his right to vote because of his race. It is thus clear that a case is not removed from the domain of judicial review merely because the unconstitutional discrimination is accomplished by an exercise of the state's power to control its political subdivisions.

In the *Gomillion* case, the Court distinguished *Colegrove* v. *Green* on the ground that *Colegrove* involved legislative inaction causing dilution in voting strength, in contrast to affirmative legislative action to deprive Negroes of their right to vote. The distinction between legislative action and inaction in *Gomillion* goes, however, not to the power of the federal courts to hear the case, but at most to the merits of the alleged constitutional violation or to the appropriate remedy. If the Illinois legislature in the *Colegrove* case and the Tennessee legislature here had a duty imposed by the federal Constitution to act, their inaction was a constitutional violation (see *infra*, pp. 64–65). That is the issue on the merits. With regard to the remedy, if the malapportionment is due to legislative inaction, a determination of unconstitutionality leaves no earlier statute to fall back on, for the earlier statute would result in even more extreme

malapportionment. As we will show below (pp. 33–40), however, there are effective remedies available other than merely holding the present apportionment unconstitutional. But with respect to the question of the jurisdiction of the federal courts, we submit that there is no basis for considering a constitutional violation resulting from legislative inaction (where the legislature has a constitutional duty to act) as beyond the jurisdiction of the federal courts, while a constitutional violation which results from legislative action is within their jurisdiction.

b. The enactment by Congress, since the *Colegrove* decision, of the Civil Rights Acts of 1957 and 1960, 71 Stat. 637, 74 Stat. 86, also affects the reliance in the plurality opinion on the exclusively political nature of the election process. The 1957 Civil Rights Act included a provision expressly conferring jurisdiction upon the federal district courts of actions "to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, *including the right to vote.*" 28 U.S.C. 1343(4) (emphasis added). Congress thereby made clear that, in its view, questions involving "political" rights, "including the right to vote," were "meet for judicial determination." Cf. *Colegrove* v. *Green, supra,* 328 U.S. at 552. The 1960 Act specifically authorized the federal courts to consider applications for registration for voting under certain circumstances, so as to afford complete judicial protection against discrimination. 74 Stat. 90. Congress thereby emphasized, once again, the national policy of relying on the Judiciary as the organ through which the

right to vote is to be made fully effective.[16] Both Acts express the intent of Congress and the national consensus that, whatever disagreement may exist as to other civil rights, (1) the right to vote should be afforded federal protection to the fullest possible extent, and (2) that protection should principally take the form of court action.

c. Another important factor on which reliance was placed in the *Colegrove* opinion (see *supra*, p. 30) is the difficulty of finding an effective and appropriate remedy for the alleged violation of the Constitution. But the state courts have on several occasions found judicial remedies which have effectively ended at least the most serious instances of malapportionment. See Lewis, *op. cit. supra*, pp. 1066–1068. The most recent such instance is in New Jersey. In *Asbury Park Press, Inc.* v. *Woolley*, 33 N.J. 1, 161 A. 2d 705, the New Jersey Supreme Court held that it had "[t]he authority and the duty" to act in cases of malapportionment. 161 A. 2d at 710. After citing numerous cases in which other courts had accepted this same responsibility,[17] the court held (161 A. 2d at 711):

> From the foregoing it is manifest that the triunity of our government is not invaded by

[16] The 1960 Act defines the word "vote" to include "all action necessary to make a vote effective." 74 Stat. 91.

[17] See *Magraw* v. *Donovan*, 159 F. Supp. 901 (D. Minn.); *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii); *Shaw* v. *Adkins*, 202 Ark. 856, 153 S.W. 2d 415; *Armstrong* v. *Mitten*, 95 Colo. 425, 37 P. 2d 757; *Moran* v. *Bowley*, 347 Ill. 148, 179 N.E. 526; *Brooks* v. *State*, 162 Ind. 568, 70 N.E. 980; *Denney* v. *State*, 144 Ind. 503, 42 N.E. 929; *Parker* v. *State*, 133 Ind. 178, 32 N.E. 836, rehearing denied, 33 N.E. 119; *Stiglitz* v. *Schardien*, 239 Ky. 799, 40 S.W. 2d 315; *Ragland* v. *Anderson*,

> acceptance of this litigation for decision. If by reason of passage of time and changing conditions the reapportionment statute no longer serves its original purpose of securing to the voter the full constitutional value of his franchise, and the legislative branch fails to take appropriate restorative action, the doors of the courts must be open to him. The lawmaking body cannot by inaction alter the constitutional system under which it has its own existence.

Despite its recognition of its power to act, the court did not order any particular relief. Instead, it retained jurisdiction of the cause from the date of decision, June 6, 1960, until the legislature had time to reapportion under the 1960 census figures. The court assumed that the legislators would act pursuant to their oath of office to uphold the state constitution. 161 A. 2d at 712.

When the legislature took no action, the state court stated that it itself would act at 5 p.m. on February 1, 1961. The Governor thereupon convened a special ses-

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125 Ky. 141, 100 S.W. 865; *Merrill* v. *Mitchell*, 257 Mass. 184, 153 N.E. 562; *Donovan* v. *Suffolk County Apportionment Com'rs*, 225 Mass. 55, 133 N.E. 740; *Attorney General* v. *Suffolk County Apportionment Com'rs*, 224 Mass. 598, 113 N.E. 581; *Williams* v. *Secretary of State*, 145 Mich. 447, 108 N.W. 749; *Board of Sup'rs of County of Houghton* v. *Blacker*, 92 Mich. 638, 52 N.W. 951; *Giddings* v. *Blacker*, 93 Mich. 1, 52 N.W. 944; *State ex rel. Barrett* v. *Hitchcock*, 241 Mo. 433, 146 S.W. 40; *Rogers* v. *Morgan*, 127 Neb. 456, 256 N.W. 1; *In re Sherill*, 188 N.Y. 185, 81 N.E. 124; *People ex rel. Baird* v. *Board of Sup'rs*, 138 N.Y. 95, 33 N.E. 827; *Jones* v. *Freeman*, 193 Okla. 554, 146 P. 2d 564; *State ex rel. Lamb* v. *Cunningham*, 83 Wis. 90, 53 N.W. 35; *State* v. *Cunningham*, 81 Wis. 440, 51 N.W. 724; see also *Brown* v. *Saunders*, 159 Va. 28, 166 S.E. 105; Annotation, 2 A.L.R. 1337.

sion of the legislature and, at 3:13 p.m. on February 1, the legislature passed a reapportionment statute. The New Jersey Supreme Court, at 5 p.m., issued this statement (New York Times, February 2, 1961, p. 1, col. 2, p. 16, col. 5):

> We are informed that the legislature has adopted an apportionment bill which the Governor has signed. Litigation, accordingly, appears to be moot and hence the prepared opinion will not be filed.

Similarly, in *Magraw* v. *Donovan,* 159 F. Supp. 901 (D. Minn.), a suit attacking the apportionment of the Minnesota legislature was referred to a three-judge court. That court stated (163 F. Supp. 184, 187):

> Here it is the unmistakable duty of the State Legislature to reapportion itself periodically in accordance with recent population changes * * * It is not to be presumed that the Legislature will refuse to take such action as is necessary to comply with its duty under the State Constitution. We defer decision on all the issues presented (including that of the power of this Court to grant relief), in order to afford the Legislature full opportunity to "heed the constitutional mandate to redistrict."

At the 1959 session, the legislature enacted a new apportionment act and the litigation was dismissed. 177 F. Supp. 803. See also *Dyer* v. *Kazuhisa Abe,* 138 F. Supp. 220 (D. Hawaii), discussed in Lewis, *op. cit. supra,* pp. 1088–1089.

As *Magraw* shows, a state legislature faced merely with a judicial admonition and possible action may well decide to obey its duty under state law. Thus, no

judicial remedy may ever be necessary in a case such as this one. Indeed, if this Court holds that the federal courts have jurisdiction over alleged violations of the Fourteenth Amendment from gross malapportionment of state legislatures, the latter are not unlikely to act in the future when litigation is started. For there are excellent political reasons for a legislature to reapportion itself rather than wait for the federal courts to act.

Action by the state legislature is even more likely if the federal court, like the New Jersey court in *Asbury Park Press,* after first adjudicating the merits and finding a federal constitutional violation, then reserves action as to the appropriate remedy. A judicial determination that the present mode of apportionment is illegitimate, even without any remedial implementation, is bound to have a profound effect upon a legislature. The concept of legitimacy has a power of its own. Governing bodies do not lightly reject an authoritative declaration by a constitutional organ of government to the effect that a challenged course of action is unlawful.

The court's declaratory judgment of invalidity could be accompanied by an injunction against the election officials forbidding them to hold an election under the constitutionally offensive apportionment. If the state legislature continues to refuse to act, additional remedies are available to the federal courts. We discuss below how these remedies could be applied by the district court in this case if it finds on remand that appellants' rights under the Fourteenth Amendment have been violated.

(1) *An election at large.*—In other situations where no valid apportionment statute existed, elections at large have been ordered. See, *e.g.*, *Smiley* v. *Holm*, 285 U.S. 355; *Carroll* v. *Becker*, 285 U.S. 380; *Brown* v. *Saunders*, 159 Va. 28, 166 S.E. 105. The Tennessee Supreme Court, however, in *Kidd* v. *McCanless*, 200 Tenn. 273, 277, 292 S.W. 2d 40, 42, appeal dismissed, 352 U.S. 920, has stated that "[t]here is no provision of law for election of our General Assembly by an election at large over the State." But a federal court, in effectuating a federal right, is not restricted to the remedies provided by state law.

It is, of course, established that when, as here, the jurisdiction of the district court rests upon a federal substantive statute, the issues must ordinarily be determined by reference to federal law. See, *e.g.*, *Deitrick* v. *Greaney*, 309 U.S. 190, 200; *D'Oench, Duhme & Co.* v. *F.D.I.C.*, 315 U.S. 447, 455–456. As Chief Justice Stone declared for the Court in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176:[18]

> It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co.* v. *Tompkins* * * *. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are

[18] Although *Sola* was a diversity case, the issues were so dominated by the policy of the Sherman Act that the Court applied federal law derived from that policy. 317 U.S. at 176.

> nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. * * *

In *Holmberg* v. *Armbrecht*, 327 U.S. 392, 395, the Court stressed the necessity of applying federal law where the remedy for the federally created right is in equity:

> The present case concerns not only a federally-created right but a federal right for which the sole remedy is in equity. * * * We do not have the duty of a federal court, sitting as it were as a court of a State, to approximate as closely as may be State law in order to vindicate without discrimination a right derived solely from a State. We have the duty of federal courts, sitting as national courts throughout the country, to apply their own principles in enforcing an equitable right created by Congress. * * * [Citations omitted.]

These principles follow *a fortiori* where constitutional rights are involved; state law cannot be permitted to prevent the realization of a constitutional right. Therefore, if no other remedy is considered available, we submit the federal courts have the power to order an election at large, despite a contrary state rule which applies in ordinary circumstances—at least until the state legislature does its duty under the federal Constitution.

(2) *An election conducted on the basis of a new enumeration and apportionment.*—The apportionment provisions of the Tennessee constitution are sufficiently clear and precise so as to permit their application by a court without the necessity of exercising an

undue amount of discretion. Apportionment is based on an enumeration of qualified voters (Tenn. Const., Art. II, Sections 4–6). Preparation of an enumeration by the court, or by county election officials on order of the court, would be largely a ministerial act, since the federal census provides a count of voting population. While the court below suggested that "the Constitution of the state vests the duty of making the enumeration in the legislature" (R. 218), the Tennessee constitution simply provides that "an enumeration * * * shall be made" (Tenn. Const., Art. II, Section 4), without specifying who shall do the enumerating. In any event, as we have already indicated, federal courts may use remedies not provided by state law if they are necessary to effectuate federal rights.

Once the enumeration of qualified voters is completed, it is then necessary to apportion the number of representatives and senators among the various districts, which consist of one or more counties. The state constitution provides a mathematical formula for the process of apportionment. Art. II, Sections 5, 6. Since counties are never divided between districts (Tenn. Const., Art. II, Section 6), the problem of remapping district lines, which was stressed in *Colegrove* (328 U.S. at 553), is not present. The only discretion involved in forming election districts arises where, according to the formula, adjoining counties must be grouped together because they do not have sufficient population.[19]

[19] See the proposed plans of apportionment appellants have attached to their complaint (Exs. A and B; R. 21, 23), in order to distribute fairly the seats in each house of the Tennessee legislature.

Moreover, if the court below wished to avoid the actual apportionment of representatives, it could require that, on the basis of the new enumeration of qualified voters, the state election officials prepare a new apportionment. The plan proposed by the state election officials could then be submitted to the court for its approval.

(3) *A possible reapportionment of votes in the state legislature.*—The New Jersey Supreme Court's decision in *Asbury Park Press, Inc.* v. *Woolley, supra,* 33 N.J. 1, 161 A. 2d 705, 714 suggests another approach that may be mentioned. After an enumeration of qualified voters, existing patterns of over or underrepresentation become apparent. In those cases where overrepresentation exists, a district court could order that the value of the vote of each representative or senator be reduced by the amount necessary to offset the overrepresentation. In other words, in overrepresented counties or districts, representatives and senators would be entitled to fractional, rather than full, votes. Similarly, legislators from underrepresented districts would receive more than one vote each.

The above discussion is not intended to be definitive or complete on the question of an appropriate remedy. Its purpose is only to meet the contention that no appropriate remedy is available and that, therefore, the federal courts are without jurisdiction. On the contrary, we submit that this case should be approached, like other cases of an alleged constitutional violation, by ascertaining whether the

federal courts have jurisdiction over the issue presented. If they have jurisdiction and a constitutional violation is found, then the question of a remedy should be considered. We do not think the premise can be accepted that the federal courts possess no appropriate remedy whatsoever among their broad and flexible equitable powers to prevent a violation of the Fourteenth Amendment from state legislative malapportionment. In other Fourteenth Amendment cases, the powers of the federal courts have not been found lacking. The fact that in this area devising a proper remedy may call for a delicate and resourceful exercise of federal judicial power does not affect the court's jurisdiction.

3. *In Any Event, the Plurality Opinion in* Colegrove *v.* Green *Should Not Be Applied to Malapportionment of State Legislatures.*

As we have emphasized (pp. 23–29), we do not believe that the plurality opinion in *Colegrove* v. *Green* has been accepted by a majority of this Court, so as to deny all power in the federal courts to consider the alleged unconstitutionality of congressional apportionment. We have also argued (pp. 29–41) that, if we are wrong in this respect and if the opinion is deemed to have become a holding of the Court, it is no longer supported by the principles on which it relied. But even if the opinion of the three Justices in *Colegrove* is considered as conclusive on the issue of congressional malapportionment, it nevertheless should not be applied to the significantly different problem of the malapportionment of state legislatures.

a. The plurality opinion relied heavily on Article I, Section 4, of the Constitution. It emphasized that Article I, Section 4, "conferred upon Congress exclusive authority to secure fair representation by the States in the popular House" (328 U.S. at 554). This statement of exclusive power, in itself, was apparently considered by the Court sufficient to support the conclusion that the federal courts had no jurisdiction to act with regard to congressional malapportionment.

Article I, Section 4, has no relevancy to the issue of malapportionment of a state legislature now before the Court. Neither that section, nor any other part of the Constitution, gives exclusive authority to Congress or to state legislatures to decide whether state legislatures are so discriminatorily apportioned as to violate the Fourteenth Amendment. While the state legislatures doubtless have the initial and even primary responsibility to assure fair representation in their own bodies, nevertheless this power cannot be exclusive or final. If the state legislatures violate the federal Constitution through discrimination against urban voters, there must be a federal remedy—just as for other constitutional violations. And while Section 5 of the Fourteenth Amendment gives Congress power to legislate in order to remedy such violations, there is no basis for inferring that this power is exclusive. Cf. *Brown* v. *Board of Education*, 347 U.S. 483. On the contrary, Congress in numerous statutes, including those relied on by the appellants here (see *supra*, pp. 2–3, 19–20), has clearly given jurisdiction to the federal courts to act when the states have violated the Fourteenth Amendment. And this Court has re-

peatedly upheld the power of the federal courts to act pursuant to these statutes. See, *e.g.*, *Monroe* v. *Pape*, No. 39, this Term, decided February 20, 1961.

b. Another factor relied upon in the plurality opinion in *Colegrove* (see *supra*, p. 30), was the existence of other remedies for congressional malapportionment. It was suggested that either Congress or the state legislatures could remedy the situation. While Congress has failed to act on congressional reapportionment (Lewis, *op. cit. supra*, pp. 1093–1095), Illinois did reapportion its congressional districts shortly after the *Colegrove* decision (though the reasons for this action are not clear (see Lewis, *op. cit. supra*, p. 1088)), and many other states have reapportioned their *congressional districts* from time to time (see *infra*, pp. 48–49). But neither Congress nor many state legislatures have provided a remedy against malapportionment in the *state legislatures*, which is generally far more grossly discriminatory than congressional malapportionment. This problem has become almost impossible to correct in Tennessee and numerous other states because of malapportionment of the state legislatures themselves and the absence of any other state remedy. The only realistic remedy is federal judicial action.[20]

c. In addition to the lack of any other effective remedy, there are extremely important practical factors supporting the power of federal courts to take action to protect the important constitutional right to

[20] We discuss below (pp. 50–51, 56–58), in considerably greater detail, the possibility of nonjudicial remedies generally, as well as in Tennessee.

vote. These exigencies will be considered more fully below. It is sufficient here to emphasize that the problem involved in this case—underrepresentation of urban voters—is more serious with regard to elections for the state legislature than to congressional elections (see *infra*, pp. 46–51); itself promotes congressional malapportionment; (*infra*, p. 51); and has seriously undermined responsible state and local government, particularly by causing the state legislatures to ignore pressing urban needs (*infra*, pp. 52–56). We present these arguments, not to show that the federal courts should act because there is a need for judicial action, but rather to show that judicial action, clearly within the power of the federal judiciary, should not be withheld on any asserted grounds based on "practical realities."

II

THIS IS AN APPROPRIATE CASE FOR THE FEDERAL COURTS TO EXERCISE THEIR EQUITABLE DISCRETION AND CONSIDER THE ALLEGED VIOLATION OF THE FOURTEENTH AMENDMENT ON THE MERITS

We have argued above (pp. 24–29) that the decisions of this Court in *Colegrove* v. *Green* and subsequent cases, in refusing to provide a remedy for malapportionment, were based, not on any lack of power of the federal courts over such constitutional violations, but on the ground of equitable discretion. None of these cases has any explicit discussion of the particular reasons for equitable forbearance except for Mr. Justice Rutledge's opinion in the *Colegrove* case itself. He stressed that the shortness of time before the election,

which the plaintiffs sought to restrain, would make it difficult for the Illinois legislature to reapportion its congressional districts; and that the alternative, an election at large, would be contrary to the policy of Congress. He concluded that jurisdiction should be exercised by the federal courts in this sensitive area "only in the most compelling circumstances" (328 U.S. at 565) and that the situation before the Court did not meet this test.

In the instant case, there is no problem of an imminent election, and we submit that the complaint alleges "most compelling circumstances." We believe this to be so, whether or not the complaint is ultimately found to allege a violation of the Fourteenth Amendment—a question involving the substantive merits. As we will discuss below in Point III (pp. 59–60), we do not think that this Court need, at the present time, determine whether a constitutional violation is alleged. Here, in Point II, we emphasize that the allegations are sufficient to show such compelling circumstances in the State of Tennessee that the federal courts should consider the merits of the controversy. Moreover, as we will also stress, the circumstances are not peculiar to Tennessee but exist in many other states even to a greater degree.

At the least, we do not believe that this case presents so clear a situation for judicial refusal to act that this Court should itself determine that there is no reasonable basis for the federal courts to exercise their equitable discretion to hear the case. Since the case falls within the area where the district court could have reasonably exercised its discretion to consider

the merits—if it had not erroneously held that the federal courts are totally without jurisdiction—this issue should be returned to the court below for determination, if this Court has any doubt, whether "compelling circumstances" are presented justifying consideration of the litigation on the merits. For the exercise of equitable discretion, in cases in which that discretion could reasonably be exercised either way, lies initially in the trial court. This is particularly so here where the trial court stated that the evil involved was serious and suggested that, if it had the jurisdictional power, it would consider the merits (see R. 219).

A. STATE LEGISLATIVE DISTRICTS ARE EVEN MORE INEQUITABLY APPORTIONED IN MANY STATES THAN CONGRESSIONAL DISTRICTS

While great disparities in population exist in many states between congressional districts, these inequalities are not nearly as great as the disparities between state legislative districts. At the time *Colegrove* v. *Green* was decided in 1946, the disparity between the most and least populous congressional districts in Illinois was approximately eight to one. Illinois had then, by far, the most badly apportioned congressional districts of any state in the country. Only one other state had a more than four to one disparity (Ohio), another state had a more than three to one disparity (South Dakota), and eleven other states had more than two to one disparities. See Appendix I to Mr. Justice Frankfurter's opinion in *Colegrove* v. *Green, supra,* 328 U.S. at 557–559. Similarly, in 1950, only one state had a

more than three to one disparity (South Dakota), and nine others had a more than two to one disparity. In Tennessee both in 1946 and 1950, the rate was slightly less than two to one.

In contrast, the situation in most state legislatures is considerably worse.[21] Figures derived from the 1950

[21] Some of the states in which there are large disparities in the lower houses are as follows (based on the 1950 census):

State	Largest and smallest congressional district	Largest and smallest legislative district in their lower house
Alabama	558, 928	79, 846
	250, 726	8, 027
Connecticut	539, 661	
	274, 300	
Lower house, which represents towns		88, 699
		130
Upper house, which represents population		122, 931
		24, 309
Delaware	One Representative	35, 762
		1, 321
Florida	525, 041	165, 028
	210, 428	2, 199
Georgia	618, 431	157, 857
	246, 227	2, 494
New Hampshire	276, 945	2, 179
	256, 297	16
Pennsylvania	444, 921	77, 106
	255, 740	4, 944
Tennessee	482, 393	75, 134
	247, 912	3, 948
Utah	402, 310	15, 437
	286, 452	364
Vermont	One Representative	33, 155
		49

These statistics are derived from tables at 106 Cong. Rec. 13828–13829 (daily ed.) and Hearings on Standards for Congressional Districts (Apportionment) before Subcommittee No. 2 of the House Judiciary Committee, 86th Cong., 1st Sess., p. 80.

federal census show that in Kansas, Delaware, Florida, Vermont, and Connecticut, majorities in the lower chamber of the state legislature represented only 22½ percent, 19½ percent, 17 percent, 12½ percent, and 9½ percent of the population, respectively. 106 Cong. Rec. 13828 (daily ed.). In Tennessee, according to the complaint, only 40 percent of the voters elect 63 of the 99 members of the lower house and 37 percent of the voters elect 20 of the 33 members of the upper house (R. 13).

Looking at malapportionment from a slightly different angle, in Florida the smallest population per representative was 2,199, while the largest was 165,028. Thus, the votes of some Florida citizens were worth 75 times the votes of others. In New Hampshire, the smallest population per representative was 16, the largest 2,179, a ratio of 136 to 1. In Vermont, the smallest population per representative was 49, the largest 33,155, a ratio of 676 to 1. In Tennessee, the smallest population per representative is 3,948, the largest 75,134, a ratio of 19 to 1.[22]

As we have seen, the malapportionment of the state legislatures is considerably greater throughout the country (including Tennessee) than malapportionment of congressional districts, serious as the latter also is. This is not a matter of mere accident. For reapportionment of congressional districts is virtually assured by law from time to time in most

[22] The record shows that the 2,340 qualified voters (as contrasted to total population) of Moore County are entitled to one representative in the Tennessee House of Representatives while the 312,345 voters of Shelby County elect only seven (R. 231, 234). This is a disparity of approximately 20 to 1.

states. Every ten years the House is automatically reapportioned. The new apportionment is calculated by the executive department and transmitted to Congress.[23] Each state is then notified of the number of Representatives to which it is entitled. 46 Stat. 26 (1929), as amended, 2 U.S.C. 2(a). If the state loses one or more Representatives, it is required either to reapportion or to elect all its Representatives at large. The latter alternative has rarely been adopted, particularly by states with more than two Representatives. If the state gains one or more Representatives, it can either reapportion or elect the added Representatives at large. Again, the latter alternative has rarely been followed by the larger states.[24]

The result has been that there was no appreciable change in the malapportionment of Congress from 1928 to 1950. In 1928, three states had a disparity between congressional districts of more than three to one and nine others of over two to one. See Appendix I to Mr. Justice Frankfurter's opinion in *Colegrove* v. *Green*, *supra*, 328 U.S. at 557–559. In 1946,

[23] The report based on the 1960 census is Message from the President, H. Doc. No. 116, 87th Cong., 1st Sess. (January 12, 1961).

[24] The 1960 census will result in nine states gaining and sixteen states losing one or more Representatives. In addition, five states will have only one Representative and two states elect, at least at present, their only two Representatives at large. See Message of the President, H. Doc. No. 46, 87th Cong., 1st Sess., pp. 1, 2; Hearings on Standards for Congressional Districts (Apportionment) before Subcommittee No. 2 of the House Judiciary Committee, 86th Cong., 1st Sess., p. 81.

one state (Illinois) had a disparity of over eight to one, another of over four to one, another over three to one, and eleven others of over two to one. *Ibid.* And in 1950 only one state had a disparity of over three to one, and but nine others had a disparity of over two to one.

The situation is, however, becoming markedly worse in the state legislatures. The reason is that there has been no outside pressure, comparable to that which has led to the reapportionment of Representatives by Congress, to force legislative action. The only major exception is where state courts have assumed jurisdiction (which has been frequent) and provided an effective remedy (which is less so). See Lewis, *op. cit. supra,* pp. 1066–1070. In states such as Tennessee in which the state courts have refused to act (see *Kidd* v. *McCanless,* 200 Tenn. 273, 292 S.W. 2d 40, appeal dismissed, 352 U.S. 920), the state legislatures have generally refused to obey the provisions in their own constitutions or statutes requiring regular reapportionment. Although the constitutions of forty-two states require reapportionment of one or both houses of the legislature every ten years (including Tennessee) or more frequently, and three other states required decennial redistricting,[25] in 1958 twenty-three of the then forty-eight states had not reapportioned for periods ranging from ten years to half a century or more. See Lewis, *op. cit. supra,* p. 1060; Alaska Const., Art. VI, Sections 3, 5–7; Hawaii

[25] Reapportionment requires only a reevaluation of the number of legislators allotted each district, while redistricting requires that the districts themselves be redrawn.

Const., Art. III, Section 4. See also 106 Cong. Rec. 13831–13833 (daily ed.) for tabular analyses of the requirements of state constitutions. Alabama, Connecticut, Delaware, Maryland, New Jersey, South Carolina, and Vermont, in addition to Tennessee, had apportionments and legislative districts which were over fifty years old. At least twenty-seven legislative chambers had not been touched for more than twenty-five years. Merry, *Minority Rule: Challenge to Democracy,* Christian Science Monitor, October 2, 1958, reprinted in 106 Cong. Rec. 13836 (daily ed.). The result has been in Tennessee, as elsewhere, that as population has shifted, particularly toward urban centers, state legislative malapportionment has become drastically worse.

In addition, malapportionment of state legislatures is a basic cause of congressional malapportionment. Since urban voters are underrepresented in the state legislatures, there is little likelihood that the legislatures will reapportion congressional districts to give urban voters their fair proportion of representation in Congress.[26] As a result, urban voters are discriminated against both in the federal House of Representatives and in their own state legislatures, and have no remedy in either body.

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[26] See Note, *Constitutional Right to Congressional Districts of Equal Population,* 56 Yale L. J. 127, 130–131 (1946); Strout, *The Next Election Is Already Rigged.* Harper's (November 1959), reprinted at 106 Cong. Rec. 13840 (daily ed.); Statement by William L. Taylor, Hearings on Standards for Congressional Districts (Apportionment) before Subcommittee No. 2 of the House Judiciary Committee, 86th Cong., 1st Sess., p. 68.

B. MALAPPORTIONMENT OF STATE LEGISLATURES IS SUBVERTING RESPONSIBLE STATE AND LOCAL GOVERNMENT AND HAS RESULTED IN THE FAILURE OF THE STATES TO MEET PRESSING URBAN NEEDS

In our country's early history, the average citizen looked to the state legislature for initiative and wisdom in the formulation of public policy on domestic issues. U.S. Commission on Intergovernmental Relations, Report to the President (1955), p. 38. Only thirty years ago Mr. Justice Brandeis singled out as an important characteristic of our federal system the fact that "a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co.* v. *Liebmann,* 285 U.S. 262, 311 (dissenting opinion). The state legislatures, however, have in very large part failed to adapt themselves to modern problems and majority needs, and this failure has resulted in public cynicism, disillusionment, and loss of confidence. Part of the reason the states have failed to respond is that in many states a majority of the people, even a large majority, do not control the legislature. The dictation of legislative action by a minority of the citizens has tended to stifle civic responsibility at the very time when novel problems are pressing upon the country.

More specifically, the most glaring consequence of malapportionment of state legislatures is the gross underrepresentation of urban interests. As cities have grown more rapidly than rural areas, the existing apportionments, when not changed by the legislatures, have tended to create an increasing imbalance in legislative representation discriminating against

urban areas.[27] As early as 1928, H. L. Mencken, in his characteristically caustic manner, commented upon the inequities of this situation. While we certainly do not share Mencken's urban prejudice against rural citizens, he did call attention to the existence of malapportionment: "The yokels hang on because old apportionments give them unfair advantages. The vote of a malarious peasant on the lower Eastern Shore counts as much as the votes of twelve Baltimoreans." Mencken, *A Carnival of Buncombe*, 160 (Moos ed., 1956) (reprinted from the Baltimore Evening Sun, July 23, 1928, p. 15, col. 4 (financial ed.). Then, in a rare note of optimism, he added: "But that can't last. It is not only unjust and undemocratic; it is absurd."[28] *Ibid.* Mencken proved a better wit than a prophet, for the same complaint and prognosis were echoed thirty years later by President (then Senator) Kennedy (Kennedy, *The Shame of the States*, New York Times Magazine, May 18, 1958, pp. 12, 37):

> * * * [T]he apportionment of representation in our Legislatures and (to a lesser extent) in Congress has been either deliberately rigged or shamefully ignored so as to deny the cities and their voters that full and proportionate voice in government to which they are entitled. * * *

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[27] See Baker, *Rural Versus Urban Political Power* (1955), pp. 16–17, note a, for a table showing the extent of urban underrepresentation in the state legislatures.

[28] It may not be entirely coincidental that the Tennessee House recently voted down a bill to repeal the "Monkey Law," which prohibits teaching about evolution, Washington Post, March 4, 1961, p. A3, col. 7.

The malapportionment of state legislatures not only subverts democratic principles generally, but also has the specific effect of precluding the states from meeting burgeoning needs resulting from the transformation of the basic character of our society from predominantly rural to predominantly urban.[29] See U.S. Commission on Intergovernmental Relations, Report to the President (1955), p. 3. It is widely agreed that the pressing domestic problems stemming from the metropolitan population explosion—housing, urban renewal and slum clearance, education, transportation, juvenile delinquency, water and air pollution—are not being adequately met. *Id.* at 38; *The Exploding Metropolis,* written by the Editors of Fortune (1957), p. 1. The failure is reflected not merely in unresponsiveness to special urban needs and lack of sympathy for the urban point of view, but also in affirmative action rendering it more difficult for urban areas to meet their own problems. This action takes such forms, as the complaint here alleges, as systematically discriminatory taxation of underrepresented, generally urban, areas as contrasted with overrepresented rural areas; far greater per capita spending by the state in overrepresented rural areas than in the urban

[29] In 1900, at least sixty percent of all Americans lived on farms or in small rural communities, and less than forty percent were city dwellers. Today approximately seventy percent of the people live in urban or suburban areas and the rural population has diminished to about thirty percent. Merry, *Minority Rule: Challenge to Democracy,* Christian Science Monitor, October 2, 1958, reprinted in 106 Cong. Rec. 13836 (daily ed.).

areas (R. 16–18; see also R. 229–254);[30] and denial even of the urban areas' proportionate share of matching funds provided by the federal government (R. 119–120). In addition, the state legislatures have frequently refused to give populous urban centers adequate authority to enable them to solve pressing local problems themselves.

Another result of the states' neglect of the reapportionment problem is that urban governments now tend to by-pass the states and to enter directly into cooperative arrangements with the national government in such areas as housing, urban development, airports, and defense community facilities. This multiplication of national-local relationships reinforces the debilitation of state governments by weakening the state's control over its own policies and its authority over its own political subdivisions. The 1955 Report of the U.S. Commission on Intergovernmental Relations (the Kestnbaum Commission, whose members were appointed by the President) cautioned (p. 40) that "the ultimate result * * * may be a new government arrangement that will break down the constitutional pattern which has worked so well up to now." After hearings on the

[30] Nor is this situation limited to Tennessee. In Colorado, for example, the legislature allows Denver only $2.3 million a year in school aid for 90,000 children, but gives adjacent Jefferson County—a semi-rural area—$2.4 million for 18,000 pupils. Strout, *op. cit. supra*, 106 Cong. Rec. 13840 (daily ed.). In Pennsylvania, the legislature pays $8 per day for the care of indigent patients to each non-sectarian hospital in the state—except Philadelphia's city-owned General Hospital, which must provide such services at an annual cost of $2.5 million. *Ibid.*

Kestnbaum study extending over a period of three years, the House Committee on Government Operations emphasized in its final report that "there is a strong national interest in encouraging vigorous and responsible State and local government." H. Rep. No. 2533, House Committee on Government Operations, 85th Cong., 2d Sess., p. 47.

C. FEDERAL JUDICIAL ACTION IS THE ONLY REALISTIC REMEDY FOR TENNESSEE'S LEGISLATIVE MALAPPORTIONMENT

1. *State Remedies*

The only possible state remedies are action by the state legislature, the state courts, or the people themselves. The last two methods can be quickly laid to rest as to Tennessee. The Tennessee Supreme Court, like many other state courts, has specifically denied a state judicial remedy for the plain violation of the state constitution. *Kidd* v. *McCanless*, 200 Tenn. 273, 292 S.W. 2d 40, appeal dismissed, 352 U.S. 920. And Tennessee, again like many other states, has no method by which the people themselves can force reapportionment by initiative and referendum (R. 117). A state constitutional convention can be called only by majority vote of two successive legislatures (Tenn. Const., Art. XI, Section 3), and, even if called, its delegates are chosen in the same manner as the legislature.

Redress by the Tennessee legislature, while not impossible, is highly unlikely. First, as the complaint alleges, numerous attempts have been made in the legislature over a period of sixty years to secure reapportionment, all of which have been rejected by the largely rural majority of the legislature, which benefits by the present malapportionment (R. 14–15, 32–38,

111). It is significant that sixty percent of the voters elect only 36 of the 99 members of the House and that no reapportionment bill since 1901 has received more than 36 votes in the House, and that sixty-three percent of the voters elect only 13 of 33 members of the Senate and that no reapportionment bill since 1901 has received more than 13 votes in that body (R. 28–31).

Second, as a matter of logic and political realism, it can hardly be expected that the rural majority would be amenable to reapportionment. As we have seen (p. 49), reapportionment of congressional districts has considerable advantages for the states, when they lose or gain representatives. Therefore, the state legislatures have reapportioned their congressional districts from time to time so that the disparity between districts rarely exceeds two to one. But there are no similar built-in correctives which would prompt a state legislature to redistrict itself. Moreover, in voting to reapportion congressional districts, state legislators do not affect their own positions. In contrast, any vote on state reapportionment involves decisions influencing the fate of almost every legislator, in some cases decisively. Legislators from the overrepresented areas controlling the legislature are particularly threatened since some are certain to lose their seats and which ones cannot be known at the time of reapportionment. As one state court has observed, "It would be idle and useless to recommit such an apportionment to the voluntary action of the body that made it." *State* v. *Cunningham,* 81 Wis. 440, 483–484, 51 N.W. 724, 730. Thus, the very grossness

of the discrimination militates against its correction by legislative means.

2. *Federal Remedies*

Congress has the power under Section 5 of the Fourteenth Amendment to pass legislation correcting malapportionment of state legislatures which violate that Amendment. But as a practical matter this remedy is unrealistic. Congress has refused to enact even a bill relating to its own malapportionment. Congressional malapportionment is closely related to reapportionment of the state legislatures, for a legislature with full urban representation is unlikely to countenance malapportionment of congressional districts discriminating against urban voters.

Thus, as Judge Miller stated below (R. 91), "[t]he situation is such that if there is no judicial remedy there would appear to be no practicable remedy at all." Unless the federal courts act, even the grossest types of state discrimination, violating both the Fourteenth Amendment and the very basis of democratic government, will likely go unchecked. In these circumstances, we believe that the federal courts should exercise their equitable discretion to consider the merits of allegations that gross malapportionment of state legislatures violates the Fourteenth Amendment.

III

THE FOURTEENTH AMENDMENT IS VIOLATED WHERE STATE LEGISLATURES ARE ARBITRARILY AND UNREASONABLY APPORTIONED

We have argued above (pp. 23–44) that the federal courts have jurisdiction to consider complaints alleging that gross malapportionment of a state legislature

violates the Fourteenth Amendment. We have further contended (pp. 44–58) that it is appropriate for the federal courts, in cases such as this, to exercise their discretion to consider the allegations on the merits but that, if there is doubt whether the necessary "compelling circumstances" are presented, this question should be considered initially by the district court.

As to the issue on the merits—whether the factual allegations of the complaint present a violation of the Fourteenth Amendment[31]—we do not believe that this issue was determined by the court below.[32] While

[31] There is of course the additional question, on the merits, whether appellants can prove their allegations. The issue before the Court now, however, is whether the appellants will ever have the opportunity to prove them.

[32] The three-judge court stated (R. 219):

> It is strenuously argued by the plaintiffs that the case alleged in the complaint is one involving a clear violation of their individual rights guaranteed by the Fourteenth Amendment, and for this reason that the Court should in some way overcome its reluctance to intervene in matters of a local political nature and formulate a remedy which would adequately protect their rights. It is insisted that the wrong committed against them by the failure and refusal of the state legislature to abide by the state constitution is clear and unmistakable and that the courts should not leave such wrong without a remedy. With the plaintiffs' argument that the legislature of Tennessee is guilty of a clear violation of the state constitution and of the rights of the plaintiffs the Court entirely agrees. It also agrees that the evil is a serious one which should be corrected without further delay. But even so the remedy in this situation clearly does not lie with the courts. It has long been recognized and is accepted doctrine that there are indeed some rights guaranteed by the Constitution for the violation of which the courts cannot give redress. * * *

that court said that this case involves a "clear violation" of the rights of appellants (R. 219), it did not in fact decide the federal question on the merits, but rather confined itself to a holding that the court was without jurisdiction to consider the merits.

Since the substantive issue is complex in itself, we do not believe that it should be determined initially by this Court. We think that the case should be remanded to the three-judge court for a full and detailed examination of this question. Hence in this Point we do not discuss the merits with the view of persuading the Court to determine them. Instead, the merits are discussed only to emphasize that malapportionment of state legislatures becomes at some point so gross and discriminatory as to violate the Fourteenth Amendment.

A. THE EQUAL PROTECTION CLAUSE

The appellants allege in their complaint that "[b]y a purposeful and systematic plan to discriminate against a geographical class of persons * * * [they] and others similarly situated, are denied the equal protection of the laws accorded them by the Fourteenth Amendment * * *" (R. 12; see also R. 10, 19). They assert that the state legislature, despite an explicit command in the state constitution, has failed to reapportion state legislative districts since 1901 (R. 9–10, 86). As a result, they allege, "a minority of approximately 37 percent of the voting population of the State now controls twenty of the thirty-three members of the senate * * *" and 40 percent of the voters elects sixty-three of ninety-nine members of the

House (R. 13). They claim that they thereby "suffer a debasement of their votes by virtue of the incorrect, arbitrary, obsolete and unconstitutional apportionment * * *" (R. 12). The complaint and the supporting papers thus assert a claim of discrimination against Tennessee voters based on their geographic location.

This Court has repeatedly held that discrimination against voters on the basis of race violates the Fourteenth Amendment. See, *e.g.*, *Nixon* v. *Herndon*, 273 U.S. 536; *Nixon* v. *Condon*, 286 U.S. 73; *Gomillion* v. *Lightfoot*, 364 U.S. 339. But, ever since *The Granger Cases* (*Munn* v. *Illinois*), 94 U.S. 113, it has been clear that the Fourteenth Amendment prohibition is by no means exhausted by discrimination based on color. Thus, discrimination between residents of a state on the basis of their geographic location is not insulated from the proscriptions of the Fourteenth Amendment.

Of course, a wide range of discretion is left to the states in choosing units of representation. So long as the state legislature fairly represents the people of the state, there would be no violation of the Constitution. It does not follow, however, that merely because some degree of inequality from the nature of things must be permitted, gross inequality must also be allowed. State legislation dealing with legislative apportionment must be measured by tests of reasonableness like other state legislation. Such legislation must be "rooted in reason" (*Griffin* v. *Illinois*, 351 U.S. 12, 21 (Mr. Justice Frankfurter concurring)) and must not create classifications so arbitrary and unreasonable as to offend the guarantees of the Fourteenth Amendment.

If a state may not resort to unreasonable and arbitrary classifications in enacting legislation affecting economic and social interests, certainly it cannot do so where the fundamental right to vote is involved. On the contrary, in this area the courts must consider the question stated in *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, note 4, "whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." See also *Minersville School Dist.* v. *Gobitis*, 310 U.S. 586, 599–600 (overruled on other grounds in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642). Writing specifically of legislation affecting the right to vote, Judge Cooley stated (2 Cooley, *Constitutional Limitations* (8th ed., 1927), p. 1370):

> All regulations of the elective franchise, however, must be reasonable, uniform and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void.[33]

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[33] See also Baker, *Rural versus Urban Political Power* (1955), p. 5:

> One of the basic assumptions of democratic rule is the doctrine of political equality. 'One man, one vote' has been the most concise and effective phrase employed to illustrate the ideal that all citizens should have approximately the same political weight. This means that repre-

Federal rights analogous to those asserted by appellants have long been recognized in the decisions of this Court. In *United States* v. *Classic*, 313 U.S. 299, the Court held that a qualified voter had a constitutional right to have his vote counted in a primary election for the House of Representatives without its being diluted by fraudulent tabulations. Similarly, in *United States* v. *Saylor*, 322 U.S. 385, the Court ruled that a qualified voter had a constitutional right to have his vote counted in the election of a Senator without its being diluted by the stuffing of ballot boxes. In both the *Classic* and *Saylor* cases, the essence of the invalidated conduct was the improper devaluation of the affected votes in relation to the votes of others. The Court found that these frauds violated a general criminal statute parallel to the civil statute involved here. Precisely the same vice can be present in a malapportionment case. The fact that the state conduct is cloaked in the garb of "apportionment" does not shield it from the command of the Fourteenth Amendment, for that Amendment invalidates discrimination "whether accomplished ingeniously or ingenuously." *Smith* v. *Texas*, 311 U.S. 128, 132; see *Gomillion* v. *Lightfoot*, 364 U.S. 339; *Taylor* v. *New Rochelle Board of Education* (S.D. N.Y.) (excerpts reprinted in N.Y. Times,

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sentative assemblies should reflect fairly accurately the character of the body politic. After all, of how much value is equal suffrage if all votes are not weighed equally? A concomitant feature of the right to vote is the right to have the vote counted—and counted as a full vote. Any considerable distortion in the representative picture means a dilution of some votes—in effect, a restriction on suffrage.

January 25, 1961, p. 24). If a state reduced the vote of Negroes, Catholics, or Jews so that each had one-tenth of a vote, or if a state passed an act requiring that all of its legislators be elected by citizens of one county, there could be no question but that the citizens discriminated against would be denied equal protection under the Fourteenth Amendment. Such voter classification plans would be arbitrary on their face. Cf. *Lassiter* v. *Northampton Election Bd.*, 360 U.S. 45, 53. More sophisticated schemes may require more searching judicial inquiry, but that inquiry is within the normal competence of the courts in adjudicating constitutional issues.

With respect to districting and apportionment problems, the Court has indicated that there may be a difference, under the Fourteenth Amendment, between state affirmative action which discriminates and state inaction having the same effect. *Gomillion* v. *Lightfoot, supra,* 364 U.S. at 346. There, state action discriminating against Negroes was held to be unconstitutional. If such discrimination was the result merely of the state's failure to correct a prior system of districting or apportionment, it is hard to imagine that state "inaction" of this type discriminating against Negroes could never violate the Fourteenth Amendment, no matter how gross it was. Similarly, as to the issue before the Court here, we submit that the state has a constitutional duty to act with regard to the apportionment of its legis-

lature, if "inaction" deprives large numbers of voters of their basic constitutional right to participate fairly in their own government. Moreover, a deliberate failure to correct an earlier apportionment which has become seriously discriminatory—coupled with the state's conduct of elections on the basis of this apportionment—is a form of state action. We cannot believe that Tennessee can properly claim that, merely because the discrimination has resulted from its inaction, the result cannot violate the Fourteenth Amendment no matter how gross the discrimination is.

B. THE DUE PROCESS CLAUSE

The appellants also alleged in their complaint that the discriminatory apportionment of the Tennessee legislature violates the due process clause of the Fourteenth Amendment (R. 19). The liberty protected by the due process clause, of course, includes the right to vote. In *Bolling* v. *Sharpe*, 347 U.S. 497, 499, this Court held that gross discrimination constitutes a denial of due process:

> * * * [T]he concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law," and, therefore, we do not imply that the two are always interchangeable phrases. But, as this Court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Thus, it appears that malapportionment can so grossly discriminate against urban voters that it violates due process.

In *Palko* v. *Connecticut*, 302 U.S. 319, Mr. Justice Cardozo (for the Court) defined the meaning of the due process clause of the Fourteenth Amendment as it has been construed by a majority of this Court. He stated that the due process clause protects rights "found to be implicit in the concept of ordered liberty" (*id.* at 325); which are "of the very essence of a scheme of ordered liberty" (*ibid.*); which, if abolished, would "violate a 'principle of practice so rooted in the traditions and conscience of our people as to be ranked as fundamental'" (*Snyder* v. *Massachusetts*, 291 U.S. 97, 105) (302 U.S. at 325); which "violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'" (*Hebert* v. *Louisiana*, 272 U.S. 312, 316) (302 U.S. at 328). We submit that, under any one of these formulas, gross malapportionment comes within the protection of the Fourteenth Amendment's due process clause. Certainly, the right to have a fair share in the choosing of one's own government is "of the very essence of a scheme of ordered liberty" and is a fundamental principle of liberty and justice lying "at the base of all our civil and political institutions." When the state arbitrarily and unreasonably apportions its legislature so as to deny the real meaning of the right to vote, *i.e.*, effective participation in democratic government, due process has been violated.

C. STANDARDS FOR DETERMINING WHETHER APPORTIONMENT IS ARBITRARY AND UNREASONABLE

Without attempting to be definitive, we would suggest several standards for determining whether legislative apportionment is so arbitrary and unreasonable as to violate the Fourteenth Amendment. Again, we do this not to enable the Court to determine the sufficiency of the complaint at this time, but merely to demonstrate that the federal courts are equipped to evaluate the merits of the alleged violations of the Constitution involved here, just as they decide other claims of unconstitutionality.

1. *The extent of the disparity between districts.*— While exact numerical equality of population within legislative districts is, of course, impossible,[34] a number of tests have been suggested for determining whether the disparity between districts is gross. Among yardsticks proposed have been tests based on an evaluation of the relative deviation above or below the average population of all districts in the state, and the relative excess of the largest over the smallest

[34] State courts have recognized that an abstract mathematical criterion should not be applied and that a more general test is required. Thus, in *Ragland* v. *Anderson*, 125 Ky. 141, 158, 100 S.W. 865, 869, the court stated:

> It is not insisted that the equality of representation is to be made mathematically exact. This is manifestly impossible. All that the Constitution requires is that equality in the representation of the State which an ordinary knowledge of the population and a sense of common justice would suggest. * * *

See also the tests approved in *State* v. *Cunningham*, 81 Wis. 440, 484, 51 N.W. 724, 730.

districts in the state.[35] For the disparity in Tennessee, see *supra*, p. 48. The results could well be compared to the disparities which have been recognized in state constitutions as proper throughout our history.

2. *Whether the state affords the people another reasonable remedy.*—Even if the malapportionment is gross, it may well not violate the Fourteenth Amend-

[35] See Note, *Constitutional Right to Congressional Districts of Equal Population*, 56 Yale L.J. 127, 138, note 45 (1946); Tabor, *The Gerrymandering of State and Federal Legislative Districts*, 16 Md. L. Rev. 277, 293, note 78 (1956); Celler, *Congressional Apportionment—Past, Present, and Future*, 17 Law & Contemp. Prob. 268, 274–275 (1952).

The following chart lists comparative population figures in certain cases where legislative reapportionment acts have been invalidated by state courts. Of course, the test under any particular state constitution may not be the same as under the Fourteenth Amendment.

	Largest district	Smallest district
Ragland v. *Anderson*, 125 Ky. 141, 100 S.W. 865 (1907)	53, 263	7, 407
Stiglitz v. *Schardien*, 239 Ky. 799, 40 S.W. 2d 315 (1931)	128, 595	39, 210
State v. *Cunningham*, 81 Wis. 440, 51 N.W. 724 (1892)	38, 801	6, 823
Baird v. *Board of Sup'rs*, 138 N.Y. 95, 33 N.E. 827 (1893)	102, 805	31, 685
Rogers v. *Morgan*, 127 Neb. 456, 256 N.W. 1 (1934)	21, 181	8, 094
Attorney General v. *Suffolk Co. Apportionment Comm'rs*, 224 Mass. 598, 113 N.E. 581 (1916)	6, 182	1, 957
Giddings v. *Blacker*, 93 Mich. 1, 52 N.W. 944 (1892)	91, 420	39, 727
Williams v. *Secretary of State*, 145 Mich. 447, 108 N.W. 749 (1906)	116, 033	52, 731

ment if the state, unlike Tennessee (see *supra*, p. 56), affords its people an alternative remedy. For example, the majority cannot complain too seriously about their underrepresentation in the state legislature in a state which provides for referenda initiated by a reasonable number of voters. Under such a system, the majority can reapportion the legislature itself. On the other hand, even such a remedy may not be sufficient if only a small minority of the people are seriously underrepresented. But if the state provides a feasible political remedy, it might be concluded that the state has not been so arbitrary as to violate the Fourteenth Amendment. When the state provides no remedy, however, except in the malapportioned legislature itself, the voters discriminated against are effectively denied, without recourse, fair participation in their own government—a basic right in any democracy. In this situation, the effect of the disparity in representation is greatly increased.

3. *Whether the disparity between districts has any reasonable justification.*—If the disparity is gross and there is no alternative remedy provided by the state, the burden of providing a rational explanation should shift to the state. This was the process suggested by the Court in *Gomillion* v. *Lightfoot*, *supra*, 364 U.S. at 342, where an analogous question of state districting was involved (see *supra*, pp. 31–32, 64–65). If the state has a reasonable justification, even a significant disparity should not be unconstitutional. Thus, a state undoubtedly can provide that one

chamber of its legislature represents equal areas or governmental subdivisions, even though the result does not approximate equal apportionment per voter.[36] In addition, even in the house designed to be apportioned per capita, the state can probably make some reasonable adjustment between popular equality and the balancing of competing interests (such as rural and urban) in the state.

Another possible justification for the disparity might be the amount of time since the last apportionment. A state is not required to keep up with every population shift by constant reapportionment, since obviously a legislature cannot be expected to reapportion every year. However, when the hiatus between reapportionments is excessive, a court can rightly inquire whether the resulting disparity of representation is gross and unreasonable. In determining what is an excessive hiatus, the courts can properly look to the requirements for reapportionment contained in state constitutions throughout the country. The constitutions of forty-two states require apportionment of one or both houses of the legislature every ten years or more frequently, and three other state constitutions require decennial redistricting (see *supra,* pp. 50–51).

In considering whether the disparity in representation is justified, the federal courts can properly consider the state constitution. It would seem difficult

[36] In Tennessee, however, the state constitution provides that both houses of the legislature are to be apportioned so as to represent voters as equally as possible. Tenn. Const., Art. II, Sections 5, 6.

for a state to justify a disparity which obviously and seriously violates its own constitution. Stated differently, a state should not be heard to present a justification denied by its own supreme law. On the other hand, we of course do not suggest that any violation of a state constitution automatically becomes a violation of the Fourteenth Amendment. But if the disparity in representation is gross, the burden should be imposed on the state to provide some explanation of the disparity in terms of a valid governmental purpose.

D. THE PRINCIPLE OF EQUITABLE ABSTENTION IN FAVOR OF STATE COURTS

When cases of alleged malapportionment of state legislatures are before the federal courts, we believe that the usual procedures followed by the federal courts should be used. In some cases, the principle of equitable abstention may dictate that the district court hold the case until the parties repair to the appropriate state court for resolution of the state issues—for example, in order to avoid the necessity of deciding a federal constitutional issue or to give the state courts an opportunity to decide, authoritatively, undecided issues of state law. See, *e.g., Railroad Commission* v. *Pullman,* 312 U.S. 496; *American Federation of Labor* v. *Watson,* 327 U.S. 582. On the other hand, except for the recent case of *Harrison* v. *N.A.A.C.P.,* 360 U.S 167, the federal courts have generally refused to apply the abstention doctrine in civil rights cases. See, *e.g., Lane* v. *Wilson,* 307 U.S. 268; *Browder* v. *Gayle,* 142 F. Supp. 707 (M.D. Ala.), affirmed, 352 U.S. 903. Nevertheless, the procedure

followed in the *Harrison* case may have considerable attractiveness in cases of state legislative malapportionment in order to avoid federal involvement and interference in the basic framework of state government. See, *e.g.*, *Matthews* v. *Rodgers*, 284 U.S. 521, 525; *Railroad Commission* v. *Pullman*, *supra*, 312 U.S. at 500; *Martin* v. *Creasy*, 360 U.S. 219, 224.

Regardless of the application of these principles in other cases, equitable abstention in favor of the state courts is not appropriate in this case. The questions have already been presented to, and reviewed by, the Supreme Court of Tennessee. *Kidd* v. *McCanless*, 200 Tenn. 273, 292 S.W. 2d 40, appeal dismissed, 352 U.S. 920. The Tennessee court refused to declare the 1901 Reapportionment Act violative of the state constitution. The court held that under Tennessee law such a declaration would (1) leave Tennessee without a legislature, either *de jure* or *de facto;* (2) would "destroy the State Government" (200 Tenn. at 282, 292 S.W. 2d at 44); and (3) would render it impossible to enact a new reapportionment law. To require relitigation of the questions of state law presented in this case would lead to an unnecessary proliferation of actions without foreseeable benefit.[37]

[37] "The King of Brobdingnag gave it for his opinion that, 'whoever could make two ears of corn, or two blades of grass to grow upon a spot of ground where only one grew before, would deserve better of mankind, and do more essential service to his country than the whole race of politicians put together'. In matters of justice, however, the benefactor is he who makes one lawsuit grow where two grew before." Chafee, *Bills of Peace with Multiple Parties*, 45 Harv. L. Rev. 1297 (1932).

CONCLUSION

For the foregoing reasons, we submit that the three-judge court had jurisdiction, and that this is an appropriate case for the federal courts to exercise their equitable discretion and consider the alleged violation of the Fourteenth Amendment. We urge, therefore, that the judgment below be reversed and the case remanded to the three-judge court for consideration of the case on the merits.

Respectfully submitted.

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MARCH 1961.

U. S. GOVERNMENT PRINTING OFFICE: 1961